

STRAITS SETTLEMENTS REPORTS.

PUBLISHED BY AUTHORITY.

[APPELLATE CIVIL JURISDICTION]

WHITLEY, AG. C. J., THOMAS, C.J. (F.M.S.)

AND AITKEN, J.

April 18, 1936.

IN RE CHEANG KENG QUEE DECEASED

CHUNG KOK SANG & 3 ORS

v.

CHUNG KOK SANG & 17 ORS.

[PENANG CIVIL APPEAL No. 2 of 1936]

Will—construction—absolute gift of corpus—vesting—condition postponing enjoyment.

A testator, by Clause 7 of his will, devised and bequeathed all his real and personal estate not thereby otherwise disposed of (hereinafter referred to as "the said trust property") to his trustees upon trust to pay out of ready money or income the funeral and testamentary expenses debts and legacies and to invest the surplus upon mortgage or in the purchase of landed property in Penang or Hongkong. By clause 11 the testator directed that on the death of the survivor of all his sons named in his will the said trust property should be held by the trustees "in trust for all the sons of my said sons (including adopted sons as above provided) who shall attain the age of 21 years or marry under that age, the said son or sons of each of my said sons taking (and if more than one equally between them) *per stirpes* and not *per capita* a share proportionate to the share of the income of the said trust property to which his or their parent (or adopted parent) may have been entitled during his lifetime under this my will. But the said trust fund shall not be distributed or any share thereof paid out to the persons entitled until the youngest of the grandsons (or adopted grandson) shall have attained 21 years of age or married under that age."

Held, that Clause 11 of the Will confers an absolute gift of a share of corpus which vests in each of the testator's grandsons on his attaining the age of 21 years or marrying earlier and that the direction contained in the concluding words of the clause which seeks to postpone the enjoyment of the gift until the youngest of the testator's grandson attains majority or marries before 21 years of age offends against the rules of law and construction and is inoperative.

Gosling v. Gosling, (1859) John 265; 70 E.R. 423; and *Wharton v. Masterman*, (1895) A. C. 186, applied.

APPEAL from an order of Gordon-Smith, J. dated the 3rd day of March 1936.

The facts and arguments are sufficiently related in the judgments below.

Mundell, (Raghavan with him) for Appellants (14th—18th defendants).

Conaghan, for Trustees-respondents.

Lynch, for 1st, 2nd, 3rd, 6th, 7th, 8th and 13th defendants.

Pooley, for 4th, 5th, 9th, 10th, 11th and 12th defendants.

Hogan, for Koh Chooi Peng representing persons entitled to income only as next-of-kin at date of Cheang Thye Phin's death.

Cur. Ad. Vult.

WHITLEY, AG. C.J.—These are two appeals from the judgment of Gordon Smith J. in an Originating Summons which raises a question of construction arising out of Clause 11 of the Will of Cheang Keng Quee deceased.

The Testator died in 1901.

Clause 11 reads as follows:—

"On the death of the survivor of all my said sons the said trust property shall be held by my said Trustees in trust for all the sons of my said sons (including adopted sons as above provided) who shall attain the age of 21 years or marry under that age the said son or sons of each of my said sons taking (and if more than one equally between them) *per stirpes* and not *per capita* a share proportionate to the share of the income of the said trust property to which his or their parent (or adopted parent) may have been entitled during his life-time under this my Will. But the said Trust Fund shall not be distributed or any share thereof paid out to the persons entitled until the youngest of the grandsons (or adopted grandson) shall have attained 21 or married under that age."

Cheang Thye Phin the last surviving son of the Testator died on the 29th March 1935. It will be observed that the beneficiaries under this clause are "sons of sons." For the purposes of convenience I shall in this judgment refer to them as "grandsons." Eighteen such grandsons are now living and they are the Defendants in this Summons. Some are of age and some are infants.

As the result of previous litigation it is definitely settled that the eighteen Defendants are the grandsons who take under this clause and that they are entitled to the whole of the corpus in certain shares which are also definitely ascertained. The only question remaining to be decided is whether the concluding words of the clause whereby the Testator seeks to cut down the trust constitute a direction to which the Court will give effect or whether that direction is contrary to some rule of law and therefore nugatory and incapable of being carried out. That in effect is the question which the Court is asked to decide in this Summons.

I agree with the learned trial Judge that it was clearly the intention of the Testator to prevent the dissolution of his estate and the distribution of the corpus for as long a period as the law permitted. If effect is given to the postponement words the corpus will not be distributed until the youngest son of Cheang Thye Phin attains the age of 21 or marries under that age. If by reason of their offending against some rule of law those words are struck out then, as from the date of Cheang Thye Phin's death, such grandsons as have attained the age of 21 or have

married before that age are entitled to an immediate payment of their respective shares of the corpus and the remaining grandsons at present under age and unmarried will similarly become entitled to payment of their shares of corpus as and when they attain twenty one or marry under that age.

But however clear the intention of a testator may be the Court will not give effect to it if it is contrary to some rule of law. In this case the Testator has been careful to keep within the rule against perpetuities but the appellants contend that by attempting to postpone the time of enjoyment by beneficiaries after having made an absolute gift to them he has offended against the rule of law which was thus stated by Page Wood, V.C. in *Gosling v. Gosling*, 70 English Reports page 423:—

“The principle of this Court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age—unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.”

This statement of the law was quoted with approval by Lord Herschell, L.C. in *Wharton v. Masterman*, (1895) A.C. page 186 where he observed that a necessary consequence of the conclusion that a gift has vested is that the enjoyment of it must be immediate on the beneficiary becoming *sui juris* and cannot be postponed until a later date unless the testator has made some other destination of the income during the intervening period. This doctrine he went on to say

has been so long settled and so often recognized that it would not be proper now to question it.

There can accordingly be no doubt that if by the first part of Clause 11 the Testator made an absolute gift of a share of corpus which vests as and when each grandson comes of age or marries earlier the Court will not give effect to the second part of the clause which seeks to postpone the enjoyment of the gift until a later date, there being no suggestion that during the interval the property is given for the benefit of another.

The learned trial Judge held that whilst there is an absolute devise of the income of the trust property as from the death of the last surviving son, there is no absolute devise of the corpus as at that date “as it is postponed to a further date.” Accordingly he held that there is nothing to prevent the Court from giving effect to the proviso for postponement.

With respect it seems to me that he was wrong in holding that there was no absolute devise of corpus. Apparently his reason for coming to that conclusion was that the Testator had directed that distribution be postponed and that such a direction prevented the gift from being absolute. If that reason is a sound one it would seem that *Gosling v. Gosling* should have been decided the other way for it could equally well be argued in that case that what would otherwise have been an absolute gift of the Testator's residuary estate to a devisee on his attaining the age of 21 was prevented from being an absolute gift by reason of the subsequent direction that he should not be put in possession or enjoy the income until he became 25.

It seems to me clear from the *ratio decidendi* in *Gosling v. Gosling* that the question as to whether or not there has in the first instance been an absolute gift ought to be considered and decided apart altogether from the proviso seeking to postpone enjoyment. Otherwise it would come to this that there could never be an absolute gift in any case where such a proviso appears in the Will. If I am right in that view it follows that the first thing which we have to do in the present case is to consider what would be the effect of clause 11 if the proviso were not there. A direction to hold in trust is equivalent to a common law gift and it is, I think, quite clear that leaving out the words of the proviso the clause confers an absolute gift of a share of corpus vesting in each grandson on his attaining 21 or marrying under that age. These shares of corpus admittedly carry with them corresponding shares of income.

The position then is that the Testator having first made absolute gifts seeks by subsequent

words to postpone the enjoyment of those gifts and that being so the rule in *Gosling v. Gosling* applies and it becomes the duty of the Court to strike out those words.

Mr. Pooley arguing in support of the judgment admitted that the only condition which each grandson has to fulfil in order to become entitled to the share in corpus given to him by clause 11 is either to attain the age of 21 or to marry earlier and that such share in corpus vested in interest when Cheang Thye Phin died but he argued that there is nothing to prevent a proviso being added that such share shall not vest in possession till a later date. He was however unable to advance any cogent reason why the rule in *Gosling's* case should not apply here if the shares in corpus vested absolutely in interest at Cheang Thye Phin's death so that his argument brings us back to the same point—were the gifts absolute or not. I have already indicated that in my opinion there can only be one answer.

Mr. Pooley further relied upon the cases of *In re Horsnail*, (1909) 1 Ch. page 631 and *In re Kipping*, (1914) 1 Ch. page 62 but I cannot see that they really help him as in each of those cases there was a trust for sale and conversion and the decisions turned upon the absolute power given to the trustees to postpone the sale and conversion. He emphasised at length the difficulties which must be encountered by the trustees in distributing the property at different dates as and when each grandson becomes entitled to his share, the property in question all being immovable property. Clearly it may well be a difficult matter but all trustees have powers of appropriation and sale of which they can avail themselves when any beneficiary becomes entitled to his share and the mere fact that in any particular case it may not be easy to carry out such an appropriation is no reason for indefinitely depriving a beneficiary of the enjoyment of what is due to him. All parties agree that the appropriation and distribution should be carried out under the direction of the Court and I think the Order should so direct.

There was no appeal against the first paragraph of the Order in the Court below which dealt with income but by consent of all parties it was agreed that it should be varied so as to read as follows:—

“That upon the true construction of the abovementioned Will of Cheang Keng Quee deceased (hereinafter called the Testator) and in particular of Clause XI thereof, the previous trusts as to the income of the property subject to the trusts of the said Will (hereinafter referred to as “the Trust Property”) came to an end on the 29th day of March, 1935, i.e. the

date of the death of Cheang Thye Phin, the last surviving son of the Testator and that under the said Clause XI of the said Will the Trust Property is now held by the Trustees Upon Trust to pay the income thereof pending distribution of the corpus or any part of the corpus thereof to the persons and in the proportions following, that is to say:—Two-Sevenths to the First Defendant, the son of Cheang Thye Yin, One-Seventh each to the Second and Third Defendants, the sons of Cheang Thye Ngit, Two-Sevenths equally between each of them the Fourth to Thirteenth Defendants inclusive, the sons of Cheang Thye Phin or between or to such of them as for the time being shall be living and One-Fifth of One-Seventh to each of them the Fourteenth to Eighteenth Defendants inclusive, the sons of Chung Kong Yong.”

As regards the second paragraph of that order I would allow the appeal and the answer to the question raised by the Summons should be that upon the true construction of Clause 11 such sons of sons as have attained the age of 21 or married under that age are entitled to receive their respective shares of the corpus immediately and that as regards those sons of sons who have not yet attained the age of 21 or married under that age they will become entitled to receive their shares as and when they respectively attain the age of 21 or marry under that age.

The order as to costs in the Court below will stand and the order which I would propose as regards the costs of the appeal would be that the costs of all parties be taxed as between solicitor and client and be paid out of the Trust property to be debited against the corpus but that only one set of costs be allowed for preparing the Record of Appeal such costs to be paid to the 14th, 15th, 16th, 17th and 18th Defendants as their notice of appeal was filed first.

THOMAS, C.J. (F.M.S.)—These two appeals have been heard together. They are from so much of the judgment of Gordon Smith J. as directed a postponement of the distribution of the corpus of the trust property until the youngest of the sons of the sons of the Testator Cheang Keng Quee (as defined by clause 4 of his Will) should have attained the age of twenty-one or married under that age.

The facts have been very fully set out in the judgment appealed from, and it is not necessary to repeat them here.

All the sons of the testator are now dead, Cheang Thye Phin being the last to die. With the exception of the children of Cheang Thye Phin all the other grandsons have attained the age of twenty one. Of the children of Cheang

Thye Phin, the youngest is stated to be about twelve months old only. Now there can be no doubt that the Testator intended, by clause 11 of his Will, to postpone the distribution of the corpus of the trust property for as long a period as possible; and in construing a will the Court will give effect to the intention of a testator, provided that there is no rule which prevents that intention from taking effect. It is, however, a rule that once property has been given absolutely it cannot be fettered by conditions—(see *McGrath v. Morehead*, 12 Eq. Cases, page 491). Accordingly to give effect to such an intention of a testator there must be some other interest interposed or else an intestacy as to previous income—(see *Gosling v. Gosling*, 70 E.R. page 423).

In the present case the Privy Council has ruled in respect of the construction of this very will (reported in 2 *Braddell*, page 548).

“that the trust is a trust of the said trust property in favour of the designated grandsons and is clear and unambiguous. The beneficiaries to take are free from doubt; the subject matter of the trust is the whole property.”

So no other interest has been interposed.

Clause 10 of the Will disposes of the income. The learned trial Judge says in his judgment “that the testator makes an absolute gift of the income.” With that decision I agree. There is therefore no intestacy as to previous income.

The gift is therefore absolute. In a very similar case (*re Jacob's Will*, 4 L.T.R. 104) it was held that the legatees were entitled to vested interests at twenty one.

According, therefore, to the authorities the concluding words of clause 11 should be struck out as inoperative.

It is noticeable that the decision in *Tipping v. Tipping*, (1914) 1 Ch. page 62, did not turn upon the existence of similar words but on the powers given to the trustees to postpone. In that case also the property consisted mainly of freehold and leasehold properties, but the trustees desired to postpone sale owing to the unfortunate condition of the markets.

No such reason has been advanced in the present case. So that even if it could be held that the concluding words of clause 11 should be retained to the extent of conferring a discretionary power upon the trustees, no ground would seem to have been made out for the exercise of that discretion. And in this connection I would refer to the judgment of Phillimore, L.J. in *Marshall v. Marshall*, (1914, 1 Ch. p. 192) in which he concluded that on a balance of con-

flicting rights and interests there was not enough to deprive the appellants of their *prima facie* rights.

In the case of *In re Horsnaill*, 1909, 1 Ch. page 631, also there were small freehold houses to be dealt with, and the trustees had taken advice with regard to the expediency of selling those houses, and had been advised for various reasons that the sale should be postponed. In view of the perfectly *bona fide* action of the trustees it was held that an immediate sale of the remaining freeholds should not be insisted upon. But as I have already remarked, no such grounds have been advanced during the hearing of the present case.

In my opinion so much of clause 11 of the Testator's Will, which postpones distribution until the youngest grandson attains the age of twenty one or marries, offends against rules of law and construction and is inoperative.

The realisation and distribution of the estate may be attended by difficulties, and accordingly must be under the direction of the Court.

In the course of the hearing it was agreed by all parties that some variation of the order should be made as to the distribution of the income. Eventually an amendment was approved and signed by all parties. So far as approval of the Court is necessary, it should in my opinion be given.

The appeals are allowed with costs of all parties as between solicitor and client out of the estate. In as much as only one appeal was necessary, the costs will be limited to one appeal, except as to the fees for preparing the record of the appeal, and these will go to the 14th, 15th, 16th and 18th Respondents.

AITKEN, J.—The Testator made his last will and testament on the 17th of July 1894, and died at Penang on the 13th of December 1901 without having revoked or altered it in any way. Probate was granted to three out of the four Executors and Trustees named therein on the 17th of May 1902, and to the fourth of such Executors and Trustees on the 12th of December, 1920.

The Testator evidently died a very wealthy man, and the scheme of his testamentary dispositions seems to have been to provide for his daughters by legacies, for his wives by annuities and shares in the income of his residuary estate during their respective lives, and for his sons by other shares in the same income. There are provisions allowing the children of the Testator's wives and the sons of his sons to succeed to their respective parents' shares of such income, and the Testator clearly intended to postpone the

final distribution of his residuary estate amongst the sons of his sons for the longest period the law allows.

We are told that the Testator's estate, at the time of his death, consisted almost entirely of real property. His preference for this form of investment is shown by Clause 7 of the Will, which follows immediately upon the provisions relating to the bequest of annuities to his wives, legacies to his daughters, and the disposal of articles of jewellery to his wives and concubines. So far as it is material to the question of construction now before us, Clause 7 reads as follows:—

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my Trustees upon trust out of ready money or income to pay my funeral and testamentary expenses and debts and legacies bequeathed by this my Will or by any Codicil hereto and to invest the surplus (if any) of the said ready money upon mortgage of landed property in Penang or Hong Kong or in purchasing landed property in either of the said places to be held upon the Trusts of this my Will with power for my Trustees from time to time to vary all or any of such investments for others of a like nature and to stand possessed of my said real and personal estate so devised to them as aforesaid and of the said surplus money and the investment thereof (hereinafter called "the said Trust property") In Trust to divide the income thereof into (20) equal shares and to stand possessed of such shares in trust as follows....."

It is unnecessary to set out the trusts on which those twenty equal shares of income were to be held, because all of them have come to an end now and none of them have any bearing on the question we have to decide. It is necessary, however, to take notice of the fact that the Testator's residuary estate (referred to in the will as "the said Trust property") consists solely of real property or mortgages over the same with no power in the Trustees to invest in anything else but other real estate and mortgages. It is also important to bear in mind that the Will contains nothing in the nature of a trust for sale.

The last surviving son of the Testator died on the 29th of March 1935, and clause 11 of the Will then came into operation. This clause reads as follows:—

"On the death of the survivor of all my said sons the said trust property shall be held by the said Trustees in trust for all the sons of my said sons (including adopted sons as above provided) who shall

attain the age of 21 years or marry under that age the said son or sons of each of my said sons taking (and if more than one equally between them) *per stirpes* and not *per capita* a share proportionate to the share of the income of the said trust property to which his or their parent (or adopted parent) may have been entitled during his life-time under this my Will. But the said trust fund shall not be distributed or any share thereof paid out to the persons entitled until the youngest of the grandsons (or adopted grandson) shall have attained 21 or married under that age."

There are four groups of grandsons to whom the corpus of the Testator's residuary estate has been devised by this clause, to wit:—

Group A—consisting of the first defendant, the son of the Testator's son Cheang Thye Yin;

Group B—consisting of the second and third defendants, the sons of the Testator's son Cheang Thye Ngit;

Group C—consisting of the fourth to the thirteenth defendants inclusive, the sons of the Testator's son Cheang Thye Phin; and

Group D—consisting of the fourteenth to the eighteenth defendants inclusive, the sons of the Testator's son Cheang Kong Yong.

Fortunately it is now settled and beyond dispute that the defendants constituting Groups A, B and D, all of whom have attained the age of 21 years, are entitled to the following shares of the corpus of the Testator's residuary estate:—

The first defendant to two-sevenths,

The second and third defendants to one-seventh each,

The fourteenth, fifteenth, sixteenth, seventeenth and eighteenth defendants to one-thirty-fifth each.

It is also settled, and beyond dispute, that the defendants constituting Group C, that is the fourth to the thirteenth defendants inclusive, will each become entitled to a one-thirty-fifth share in the corpus, provided that they all attain the age of 21 years or marry under that age. Should anyone or more of such defendants die under that age and without having married, then there will be an accrual of his or their contingent share or shares to the other members of the group, who will take all such accrued shares equally between them. What is in dispute, and what we have to decide, is whether the defendants constituting Groups A, B and D, that is those who

have attained 21 years of age, are entitled to have their respective shares in the corpus or the testator's residuary estate distributed to them now, or whether they must wait until the youngest surviving member of Group C attains the age of 21 years or marries under that age. As the youngest member of Group C is now only about 1½ years of age, it will be appreciated that our answer to this question will in all probability make a very considerable difference to the time of distribution of the testator's residuary estate.

Now it is admitted that the gift of corpus in clause 11 carries with it the interest accruing due on that corpus, and that the testator undoubtedly intended that the corpus of his residuary estate should be preserved intact until the youngest surviving grandson (being a son of a son) attains the age of 21 years or marries under that age. It is argued, however, that clause 11 makes an absolute gift of a share of corpus to each grandson (being a son of a son) who attains 21 years of age or marries under that age, and consequently that the provision at the end of the clause restraining their full enjoyment of such gifts to some uncertain future date is void as being contrary to the rule of law established by the case of *Gosling v. Gosling*, reported in volume 70 of the English Reports at page 423, and approved by the House of Lords in the case of *Wharton v. Masterman*, (1895) A.C. page 186. The first question to be answered, therefore, is this:—does clause 11 make an absolute gift of a share of corpus to each grandson on his attaining 21 years of age or marrying under that age? If it does not, then it is admitted that the rule in *Gosling v. Gosling* cannot apply. Indeed, the judgment in the Court below to the effect that the rule in *Gosling v. Gosling* does not apply to this clause 11 seems to be founded mainly, if not entirely, on the learned Judge's view that clause 11 contains "no absolute devise of the corpus and interest when the grandsons individually attain 21." After making this statement the learned Judge continues:—

"There is an absolute devise of the income of the trust property as from the death of the last surviving son, and there is an absolute devise of the corpus as at the attainment of 21 years by the youngest grandson; but there is no intestacy as to either corpus or income, nor is there a direction to accumulate the income in the interval, but the grandsons specifically enjoy the income in this interval. It seems to me that the intention of the testator to distinguish between corpus and income is manifest, and that although he makes an absolute devise of the income as from

a certain and ascertained date there is no absolute devise of the corpus as at this date, and it is postponed to a further date."

Seeing that the only gift contained in clause 11 is a gift of the corpus of the Testator's residuary estate, I find it difficult to understand how the learned Judge arrived at the conclusion that there was an absolute gift of income, but not of corpus, on the death of the last surviving son of the testator. On the occurrence of that event the Testator, in clause 11, directs that his residuary estate shall be held in trust—

"for all the sons of my said sons (including adopted sons as above provided) who shall attain the age of 21 years or marry under that age"

in certain shares which are then set out. With unfeigned respect for the learned Judge, I do not think it possible to interpret those words otherwise than as conferring an absolute vested interest on each grandson on his attaining 21 years of age or marrying under that age. To argue to the contrary seems to involve an attack on canons of construction which have been regarded as settled law for a hundred years and more, and it is not surprising that before the learned counsel made no attempt to do so. I can only imagine that the learned Judge was endeavouring to give effect to the Testator's undoubted intention to postpone the distribution of the corpus by reading into the gift thereof terms and provisions which are not to be found there. If that is so, then in my opinion the terms of the gift are far too clear to admit of any such additions.

Having thus decided that clause 11 does make an absolute gift of a share of corpus to each grandson (being a son of a son) who attains 21 years of age or marries thereunder, the next step is to consider the rule of law established by the case of *Gosling v. Gosling*. In that case Page Wood, V.C. laid down the law as follows:—

"The principle of this Court has always been to recognize the right of all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by a Will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to impose any fetter upon their enjoyment of it in full as soon as they attain 21. And upon that

principle, unless there is in the Will or in some Codicil to it, a clear indication on the part of the testator not only that his devisees are not to have the enjoyment he has devised to them until they attain 25 but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining 25 as to induce the Court to hold that, as to the previous rents and profits there has been an intestacy, the Court does not hesitate to strike out of the Will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

This rule of law has been recognized and acted on in many cases since *Gosling v. Gosling*, and was definitely approved by the House of Lords in *Wharton v. Masterman*, (1895) A.C. page 186. In that case Lord Herschell L.C., after quoting the passage from Page Wood, V.C.'s judgment which I have set out above, continued thus:—

"The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period. It is needless to inquire whether the Courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognised that it would not be proper now to question it."

Why, then, since the rule of law established by *Gosling v. Gosling* is settled beyond question, should it not be applied in this case where a gift of corpus, which admittedly carries the interest with it, has already vested in the case of eight out of eighteen beneficiaries, and where the testator has not made any other destination of the income during the period between vesting and distribution? Mr. Pooley was concerned to explain to us why it should not apply, and though I confess to having experienced a little difficulty in following parts of his somewhat lengthy argument, I think I have apprehended the main points on which he relied.

First of all he cited the general principle that a testator's intention, as apparent in the

words of his will, must have effect given to it so far as the law allows, and argued that since the testator had not postponed the time of distribution beyond the period allowed by law, we should construe the gift of corpus contained in clause 11 in such a way as to allow the testator's undoubted intention to prevail. The fatal objection to that argument appears to be that the terms of the gift of corpus are so perfectly clear and unambiguous that no 'construction' of them is either necessary or possible.

Secondly he suggested that it would be practically impossible to divide the testator's residuary estate, consisting entirely of real property, piecemeal and at different dates, and for this reason the trustees not only could, but should, postpone the period of distribution until all the beneficiaries have been ascertained. Here I think that learned counsel is rather exaggerating the difficulties that will arise if the rule in *Gosling v. Gosling* does apply, though it is obvious that the division of a residuary estate like the testator's into sevenths, thirty-fifths, and may be other fractions, will be a difficult matter whatever may be the time fixed for its distribution. I cannot agree, however, that hard cases should be allowed to make bad law or that difficulties in regard to the distribution of a residuary estate should be permitted to deprive beneficiaries of the full and unfettered enjoyment of property to which they are presently entitled.

Thirdly he argued that, as the testator had not empowered his trustees to sell or appropriate any part of his residuary estate during the continuance of the trusts thereby created, therefore there could be no appropriation or payment out until those trusts came to an end. In answer to that argument it does not seem to be necessary to say more than to point out that the law confers all the requisite powers of appropriation and sale on the trustees if any beneficiaries who are entitled to the immediate enjoyment of their shares of corpus insist on having the same distributed to them. In a difficult case—and no one denies that this is a difficult case—the trustees are always justified in applying to the Court for its advice and directions.

Fourthly he seemed to argue that because each of the grandsons (being sons of sons) who has attained 21 years of age has acquired a vested interest in an undivided share in the whole of the testator's residuary estate, which consists entirely of real property, the rule in *Gosling v. Gosling* does not apply to such undivided shares. I confess that this argument—assuming that it really was an argument—has puzzled me not a little, because I cannot understand why a beneficiary who has a vested interest in an undivided share of a residuary estate should be in a worse position than a beneficiary who has a similar

interest in a divided share. As the argument is advanced with special reference to real property, let me take a simple example. What is the difference between a gift of Blackacre to the testator's three sons in equal shares on their attaining 21 years of age, and a gift of Blackacre to the testator's three sons, each to have one equal third share therein on his attaining 21 years of age? On principle I apprehend that there is no difference whatever, and I have been unable to find any support for this one of Mr. Pooley's contentions in any one of the text books or cases he cited to us.

Lastly Mr. Pooley argued that the rule in *Gosling v. Gosling* should not be applied in this case because it was not applied in the cases of *In re Horsnaill*, (1909) 1 Ch. page 631, and *In re Kipping*, (1914) 1 Ch. page 62. He appeared to suggest that the rule was not applied in those two cases, because in both of them the testator's residuary estate consisted partly of land and houses. It is therefore necessary for me to examine those cases in some detail.

In *In re Horsnaill* the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and out of the proceeds to invest a sufficient sum to answer an annuity to his wife, which sum should fall into residue on her death, and subject thereto to stand possessed of the proceeds of sale and conversion and the investments thereof as to one equal third part upon trust for his son A. for life with remainder to his children, as to one other equal third part upon trust for his son W. for life with remainder to his children, and as to the remaining equal third part in trust for his daughter M. for life with remainder to her children. The Will then contained the following proviso:—

“Provided always and I hereby declare that it shall be lawful for my said trustees wholly or partially to postpone the said sale or conversion and collection so long as they shall deem proper and (sic) may during such postponement make any outlay which they may consider proper for the benefit or in respect of my estate. But the net income produced during any such postponement from all or any part of my estate howsoever invested and of whatsoever description shall as from my death be applicable as income and no property not actually producing income shall be treated as producing or entitling anyone to receipt of income.”

On those terms and provisions of the will it was held that the vesting in possession of the share of one of the beneficiaries did not put an end to the trustees discretionary power to postpone the

sale and conversion of his residuary estate, or entitle that beneficiary to call either for an immediate sale of the entirety of the residuary estate or for a conveyance of an undivided share in the land.

In the first place it is to be observed that in the *Horsnaill* case the beneficiaries were not given shares in the testator's residuary estate, as in the present case, but in the proceeds of sale of such residuary estate. Secondly it is to be observed that the testator gave his trustees a very wide power to postpone the sale of his residuary real and personal estate so long as they should deem proper. And thirdly it was not disputed that the testator's trustees had acted in perfect good faith, and had exercised their discretion wisely, in postponing the sale of the greater part of the testator's residuary real estate. The following short passage from the judgment of the learned Judge shows clearly how largely his decision rested on the trust for sale and power to postpone:—

“The settlement effected is of the proceeds of sale; no one *cestui que trust* can call for a conveyance of the fee, or any undivided share of it. Where there is a trust for sale all the *cestuis que trustent* must be absolutely entitled and concur in applying for a conveyance in lieu of a sale in order to obviate the need for a sale—*In re Tweddle & Mills* (21 Ch. D. page 315)—and until they do so the trust for sale will, in my opinion, continue. The power to postpone the sale will also continue until all the shares become vested in possession.”

In *In re Kipping* the testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, with power to the trustees in their absolute and uncontrolled discretion to postpone the sale or conversion. The will contained a provision that until sale or conversion the rents, profits, and income arising from such part of the residuary estate as should for the time being remain unsold or unconverted should be paid or applied to the persons to whom and in the manner in which the dividends, interest and income arising from the investment of the residuary estate would have been payable or applicable under the trusts concerning the same; and the trustees were to stand possessed of the proceeds of sale of the residuary estate in trust for the testator's children who should attain the age of twenty-one years in equal shares as tenants in common. Then came a proviso that the capital of the testator's residuary estate should not be divisible amongst his children in pursuance of the foregoing trusts until his youngest surviving child should attain the age of 21 years.

The testator left seven children who were under 21 years of age, and one of them Philip Kipping, on attaining 21, claimed that he was entitled to be paid his one-seventh share of the residuary estate or to have his share appropriated to him notwithstanding the proviso I have just quoted and the fact that five of the testator's seven children were still under age. It was held that he was not so entitled so long as the trustees, in the *bona fide* exercise of their discretion determined to postpone the sale.

Upon hearing the Originating Summons in that case Warrington, J. made an order declaring that:—

“According to the true construction of the testator's will and notwithstanding the direction therein contained that the capital of the testator's residuary real and personal estate should not be divisible among his children until his youngest surviving child attained the age of twenty-one years, Philip Kipping became entitled on attaining the age of twenty-one years to a vested share: ‘but’ (following the decision of Swinfen Eady J. in *In re Horsnaill*) is not entitled so long as the trustees in the *bona fide* exercise of their discretion determine to postpone the realisation of the testator's estate to have his share raised or paid to him or appropriated *in specie*.”

Philip Kipping appealed from the latter part of the order beginning with the words “but is not entitled,” and he appealed in vain. It was not, however, on the proviso postponing the division of the testator's residuary estate until his youngest surviving child should attain the age of 21 years that the Court of Appeal relied when they dismissed his appeal, but on the trust for sale and the trustees' discretion to postpone that sale. This appears quite clearly from the following passage in the judgment of Buckley, L.J.:—

“The trusts declared of the proceeds of sale were for such of his children, who in fact were seven in number, as should attain the age of twenty-one years. Two of his children had, at the time of the originating summons attained that age. One of these two contends that he is entitled to have the residuary estate or a sufficient portion thereof sold in order that he may be paid his one-seventh share thereof, notwithstanding that the trustees in the *bona fide* exercise of their discretion have abstained from selling. In other words, his contention is that the trustees are bound to sell because he has a right to a distributive share of the residuary estate

and to be paid that share. He is not, in my opinion, so entitled. The will gives him, not a distributive share of a sum of money, but a distributive share of the income of the property so long as it remains unsold, and a distributive share of the proceeds of sale when the property is sold. There is no gift of the proceeds of sale until the property is sold, and he is not entitled to interfere with the *bona fide* exercise by the trustees of their discretion and to call upon them to sell. There is no original gift to him under which he is entitled to have the property sold now. The learned Judge followed the decision of Swinfen Eady J. in *In re Horsnaill*, a case which, in my opinion, was rightly decided. The appeal must therefore be dismissed.”

From the examination of these two cases, which I have just completed, I have come to the conclusion that they do not support Mr. Pooley's contention in any way. The decision in each case turns on the trust for sale, the absence of any gift of corpus until the residuary estate was sold, and the discretionary power to postpone sale. All these features are lacking in the case now before us, and in *Kipping's* case a clause purporting to delay the distribution of the testator's residuary estate until his youngest surviving child should attain the age of 21 years was disregarded.

One other case dealing with a trust for conversion of a testator's residuary real and personal estate, coupled with a discretionary power to postpone such conversion, was cited to us, namely *In re Marshall*, (1914) 1 Ch. page 192. The question therein raised concerned certain shares in a public Company which formed part of the testator's residuary estate, which the trustees wished to retain and which certain beneficiaries who had attained 21 years of age wished to have divided. In the circumstances of the case the decision went against the trustees, but I cannot see that that helps in any way to decide this appeal. The only passage in the judgments in that case—it went to the Court of Appeal—which was quoted to us was the following short passage from the judgment of Cozens-Hardy M.R.:—

“Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law. There is also another case which is equally plain and established by law, that where real estate is devised in trust for sale and to divide the proceeds between A, B, C and

D—some of the shares being settled and some of them not—A has no right to say ‘transfer to me my undivided fourth of the real estate because I would rather have it as real estate than personal estate.’ The Court has long ago said that that is not right, because it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate; therefore, to allow an undivided share to be elected to be taken as real estate by one of the beneficiaries would be detrimental to the other beneficiaries.”

Although this passage was quoted to us by Mr. Pooley, it seems to me to be definitely against his contention. The state of affairs with which we have to deal appears to fall quite clearly within the first of the Master of the Rolls’ categories, namely, persons entitled indefeasibly in possession to aliquot shares of property, and not within the second category which only comprises persons who are entitled to the proceeds of a trust for sale of real property. If there was a trust for sale and conversion of the testator’s residuary estate in the present case, coupled with a power to postpone such sale and conversion, I should unhesitatingly follow *In re Horsnail* and *In re Kipping*; but in the absence of any such trust for sale and power to postpone I feel compelled to take the view that those beneficiaries who are already entitled indefeasibly in possession to aliquot shares in the testator’s residuary estate have a right to have those shares paid out or transferred to them.

I have now completed my examination of the arguments for and against the application of the rule in *Gosling v. Gosling* to clause 11 of the testator’s will, and I have come to the conclusion that it applies thereto. In my opinion we must strike out of that clause the direction that the testator’s residuary estate should not be distributed or any share thereof paid out to the persons entitled until the youngest of the grandsons shall have attained 21 or married under that age. Disregarding, therefore, that direction it seems to be clear enough that clause 11 confers an absolute vested interest on each grandson of the testator (being a son of a son) on his attaining 21 years of age or marrying under that age. The Order made by the learned Judge in the Court below reads as follows:—

“This Originating Summons coming on for hearing on the 22nd day of January 1936 before the Honourable Mr. Justice Frederick Gordon-Smith Judge of the said Court in the presence of Counsel for the

Plaintiffs (Trustees) for the 1st, 2nd, 3rd, 6th, 7th, 8th and 13th Defendants, for the 4th, 5th, 9th, 10th, 11th and 12th Defendants, for the 14th, 15th, 16th, 17th and 18th Defendants and for Madam Koh Chooi Peng the person appointed by order of Court dated the 20th day of December 1935 to represent the class of persons entitled to income solely as next-of-kin as at the date of the death of Cheang Thye Phin viz. 29th March 1935, and upon reading the Originating Summons and the Affidavits of Chung Chee Choong filed herein, and copy of the Will of Cheang Keng Quee deceased and upon hearing what was alleged by Counsel for all parties, THIS COURT DID ORDER that this Originating Summons should stand for judgment and the same coming on for judgment this day in the presence of Counsel as before. This Court doth adjudge and declare as follows:—

1. That upon the true construction of the above-mentioned Will of Cheang Keng Quee deceased (hereinafter called the Testator) and in particular of Clause XI thereof, the previous trusts as to the income of the property subject to the trusts of the said Will (hereinafter referred to as “the Trust Property”) came to an end on the 29th day of March 1935 i.e. the date of the death of Cheang Thye Phin, the last surviving son of the testator and that under the said Clause XI of the said Will the Trust Property is now held by the Trustees Upon trust to pay the income thereof pending distribution to the persons and in the proportions following, that is to say:—Two-Sevenths to the First Defendant, the son of Cheang Thye Yin, One-Seventh each to the Second and Third Defendants, the sons of Cheang Thye Ngit, Two-Sevenths equally between each of them the Fourth to Thirteenth Defendants inclusive, the sons of Cheang Thye Phin and One-Fifth of One-Seventh to each of them the Fourteenth to Eighteenth Defendants inclusive, the sons of Chung Kong Yong.

2. That the Corpus of the Trust Property is not to be distributed or paid over until the youngest of the sons of the Testator’s sons as defined by Clause 4 of his said Will has attained the age of 21 years or married under that age.”

There is no appeal from clause 1 of this order dealing with the income of the trust property pending distribution, but with the consent of all parties we have varied the same so as to provide for the contingency of some one

or more of Cheang Thye Phin's infant children dying before attaining the age of 21 years or marrying under that age. The appeal against clause 2 of the order succeeds, and that clause must be set aside and the following clause substituted therefor:—

- "2. That such sons of the Testator's sons as have attained 21 years of age or married under that age are entitled, under Clause XI of the said Will, to enter upon the absolute use and enjoyment of the respective shares in corpus of the trust property thereby given to them.
3. That such sons of the Testator's sons as have not attained 21 years of age or married under that age will be come entitled, under clause 11 of the said Will, to enter upon the absolute use and enjoyment of the respective shares in the corpus of the trust property thereby given to them as and when they respectively attain the age of 21 years or marry under that age."

As this variation of the learned Judge's order will make the trust property, that is the Testator's residuary estate, immediately distributable, I think that we must accede to the trustees' prayer for an order for its administration by the Court. The distribution of his residuary estate will admittedly be a very difficult matter, a suit for its administration is already pending before the Court, and three of the trustees are also beneficiaries who will be entitled under this judgment to have their shares appropriated or paid out to them at once. In such circumstances there appears to be no alternative but for the Court to assume control over the further administration of the Testator's residuary estate.

Appeal allowed.

Solicitor for the Appellants (14th—18th defendants)—*N. Raghavan.*

Solicitors for the Trustees-respondents—*Wreford & Thornton.*

Solicitors for the 1st, 2nd, 3rd, 6th, 7th, 8th and 13th defendants—*Lim & Lim.*

Solicitors for the 4th, 5th, 9th, 10th, 11th and 12th defendants—*Presgrave & Matthews.*

Solicitors for Koh Chooi Peng, representative of persons entitled to income only as next of kin, at date of Cheang Thye Phin's death—*Hogan, Adams & Allan.*

[APPELLATE CIVIL JURISDICTION]

TERRELL, J.

June 3, 1938.

M. L. SAMUEL.....Appellant (Defendant)
v.

BHADUR SINGH alias

BAHADUR SINGH.....Respondent (Plaintiff).

[MALACCA DISTRICT COURT CIVIL APPEAL No. 2
of 1938]

Evidence Ordinance (Cap. 13) S. 93, Proviso 1—promissory note—word "witness" preceding signature—oral evidence showing signatory subscribed name as principal—inadmissibility of.

It is inadmissible to vary the terms of a promissory note by adducing oral evidence to prove that a party who, *prima facie*, signed as a witness was really a principal.

DISTRICT COURT APPEAL.

W. H. Salt, for the Appellant.

C. S. Jayaswal, for the Respondent.

Cur. Ad. Vult.

TERRELL, J.—This was a simple money claim on a Promissory Note which was Exhibit "A" in the case. The action was taken against Dorai Rajah and M. L. Samuel, as the makers of the Promissory Note. On examining Exhibit "A", the name of the 1st Defendant only appears at the head of the note, and it is signed by the 1st Defendant as promisor, and by the 2nd Defendant as witness, the word 'Wit' appearing before the 2nd Defendant's name, both under the word 'Borrowers,' and on the acknowledgment at the foot of the note.

The learned District Judge however gave judgment against both the Defendants and the 2nd Defendant has appealed.

In his grounds of judgment the learned District Judge states that he accepted generally the evidence of the Plaintiff, and finds that the Defendants agreed to sign a joint and several promissory note and that in signing as witness only, the 2nd Defendant defrauded the Plaintiff. It is not necessary for me to come to any conclusion on the facts, but I would point out that under the Money lenders Ordinance (Chapter 218) Section 4 the lender is obliged to supply the borrowers with an authenticated copy of the note, and such copy was in fact supplied, and was put in evidence as Exhibit "B." On the copy the appellant's name does not appear at all. Even if the Plaintiff could not read English, he must have seen that there was only one signature on Exhibit "B." This alone should have led to the conclusion that it might be dangerous to accept the Plaintiff's evidence without question.

Leaving that issue aside it is argued that the learned District Judge was wrong in law in